United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7694 and

ORIGINAL 76-3003

UNITED STATES COURT OF APPEALS

For The Second Circuit

B

Docket Nos. 75-7694
76-3003

P/S

TRUCK DRIVERS LOCAL UNION NO. 807,
INTERNATIONAL, BROTHERHOOD OF TEAMSTERS,

Plaintiff-Appellant

v.

THE BOHACK CORPORATION,

Defendant-Appellee.

TRUCK DRIVERS LOCAL UNION NO. 807,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Petitioner,

v.

HONORABLE JACOB MISHLER, CHIEF JUDGE
UNITED STATES DISTRICT COURT EASTERN
DISTRICT OF NEW YORK,

Respondent.

UNITED STATES COURT OF APPEALS
FILED
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SECOND CIRCUIT

Consolidated Appeal from the United States District Court for the Eastern District of New York and Petition for a Writ of Mandamus.

BRIEF OF DEFENDANT-APPELLEE

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BRIEF OF DEFENDANT-APPELLEE, THE BOHACK CORPORATION

STATEMENT OF ISSUES

1. Whether the May 16, 1975 grievance award of the New York City Joint Local Committee should be confirmed:

(a) whether the Joint Local Committee's award is void because the prior permission of the bankruptcy court to submit the dispute to that committee was not obtained as required by Bankruptcy Rule 919(b).

(b) whether the Joint Local Committee's award is void because that committee had no subject matter jurisdiction of the dispute.

2. Whether the alleged deficiencies in the injunctive order of November 26, 1975 provide a basis for a writ of Mandamus and have any basis in law or fact.

3. Whether the issues relating to Bohack's rejection of its contract with Local 807 are appropriate for appellate review at this time.

STATEMENT OF THE CASE

PRELIMINARY STATEMENT

This consolidated appellate proceeding involves (1) an appeal from that portion of the Memorandum of Decision and Order of Chief Judge Mishler of the United States District Court for the Eastern District of New York dated November 19, 1975 that dismissed appellant's petition to confirm an arbitration award (117a-129a) and (2) a petition for a writ of mandamus by which appellant seeks review of the remaining adverse portions of Chief Judge Mishler's November 19, 1975

Memorandum of Decision and Order and of the irjunctive relief issued by Chief Judge Mishler on November 26, 1975 (187a-188a).

This brief shows that Chief Judge Mishler's November 19 and 26, 1975 decisions and orders were correct and that they should be affirmed in all respects.

STATEMENT OF FACTS

The following facts are those found by Chief Judge Mishler in his Memorandum of Decision and Order dated November 19, 1975 and as established by the sworn testimony and documents in the record.

Appellee, The Bohack Corporation ("Bohack" or the "Debtor"), a debtor in possession, operates a chain of retail supermarkets throughout Brooklyn, Queens, Nassau and Suffolk Counties. On July 30, 1974, Bohack filed a petition for arrangement under Chapter XI of the Bankruptcy Act. At the time of filing of the petition, Bohack had approximately 150 retail supermarkets and operated a warehouse and terminal including its executive office at 48-25 Metropolitan Avenue ("Bohack Square") in Brooklyn, New York. It employed approximately 3,000 employees including 150 drivers, who were members of Appellant, Truck Drivers Local Union No. 807,

International Brotherhood of Teamsters ("Union" or "Local 807") (71a, 84a-85a, 118a).

By June 30, 1975 the number of stores had been reduced to 90 and the warehousing and distribution function that serviced them was operating at a substantial loss (85a, 118a). The proposed plan of arrangement provided for the total discontinuance of the warehousing, wholesaling and delivering function (118a). In November, 1974, Bohack closed its grocery wholesaling operation and commenced purchasing its groceries from two grocery wholesalers, approximately 2/3 from Bozzuto's Inc. of Cheshire, Connecticut and 1/3 from Filligree Foods Inc. of Totowa, New Jersey. Under this arrangement Bohack drivers, members of Local 807, picked the merchandise up at the wholesalers' places of business and delivered it to Bohack's stores (85a). In December, 1974, Bohack closed its dairy and produce warehouses and began to purchase such items from another wholesaler, Shopwell (93a). Shopwell's regular drivers were represented by Local 277 of the Teamsters Union, and Shopwell insisted on delivering all goods from its warehouse to the Bohack stores through the services of its own employees (93a).

In late April or early May of 1975 Filligree filed a petition for an arrangement under Chapter XI in the United

States District Court for New Jersey, and refused to supply Bohack any longer (85a). Bohack sought alternative suppliers, including Met Foods, White Cross Foods, and Associated Foods but because of Bohack's status each of them refused to extend any credit (94a-95a). Ultimately, Krasdale Foods Inc., a grocery wholesaler, agreed to sell goods to Bohack for the stores formerly supplied by Filligree. However, unlike Filligree, Krasdale insisted on using its own drivers who were members of Teamsters Local 138 (86a).

As a result of the foregoing changes in its warehousing operations and the insistence of its suppliers on using their own drivers the number of Bohack drivers was reduced to 32 employees most of whom were engaged in delivering meat from Bohack's remaining warehouse operation to Bohack's stores. In July 1975, in accordance with the plan of arrangement, Bohack closed its meat warehousing operation and began to purchase from meat wholesalers. As a result the remaining 32 drivers were laid off.

When Shopwell refused to permit the Bohack employees represented by Local 807 to make its deliveries to Bohack stores, Local 807 filed a grievance, dated December 19, 1974, alleging that Bohack had subcontracted its driving work to Shopwell in violation of Article 32 of the Teamsters National

Agreement to which Bohack is a party. This grievance was referred to Teamster Joint Counsel 16 as a jurisdictional dispute between Local 807 and its sister Teamster Local 277 representing Shopwell's drivers (93a-94a, 119a-120a). The grievance apparently lay dormant as a jurisdictional dispute until May 1975 (when Krasdale, which used its own drivers represented by Teamster Local 138, agreed to replace Filligree, which had used Local 807's members until it filed in bankruptcy). At that time the December 19, 1974 grievance on very short notice to Bohack was reactivated before the New York City Joint Local Committee, one of a number of different arbitration panels created under the collective bargaining agreement between Bohack and Local 807 (86a). Bohack, which had consistently maintained that this Local Committee was without jurisdiction of the subject matter of the dispute, appeared without counsel, raised this objection at the outset of the hearing, and walked out (87a, 96a).

The Joint Local Committee held that Bohack "is in violation of Article 32," and ordered Bohack to "...cease and desist, forthwith, from having its bargaining unit work sub-contracted out which is violative of said Article." (120a).

On May ..., 1975, the Union instituted a proceeding for confirmation of the Joint Local Committee's award in New York State Supreme Court, Queens County. That proceeding

was removed to the District Court below and is one of the proceedings involved on this appeal (121a).

The Union was advised that Bohack did not intend to abide by the terms of the award and on June 30, 1975, the Union went on strike and placed picket lines at Bohack's terminal and at 16 of its retail supermarkets (121a). Bohack immediately applied to Bankruptcy Judge Parente for a temporary restraining order against such picketing (121a). After an evidentiary hearing on June 30th, Judge Parente found: (1) that the arbitration award of the New York City Joint Local Committee was not authorized as required by Bankruptcy Rule 919(b) and accordingly that the arbitration award was null and void and of no effect; (2) that if the strike continued, Bohack would suffer irreparable harm; and (3) that the Union's strike violated the no-strike clause of the agreement, and signed a temporary restraining order restraining the Union from picketing. Thereafter on July 16, 1975, following further proceedings, he signed a preliminary injunction (49a-53a).

Independent of this injunction, on July 18, 1975, Judge Parente on motion of the debtor in possession directed

the Union to show cause why Bohack should not be permitted to reject the executory labor contract with Local 807 as onerous and burdensome (122a). The motion, returnable on July 25, 1975, was adjourned by stipulation pending the decision of this Court in Shopmen's Local Union No. 455, International Association of Bridge Structural and Ornamental Iron Workers, AFL-CIO v. Kevin Steel Products, Inc., 519 F.2d 698 (2d Cir. 1975), which had not yet issued (122a).

At this time also, Local 807, on the basis of claimed further breaches of the subcontracting clause, commenced an action against Bohack to compel a second arbitration (71a-75a). Bohack's answer to the complaint interposed a counterclaim for a permanent injunction against the threatened resumption of a strike and picketing (76a-81a).

On August 1, 1975 Local 807's appeal from the preliminary injunction order of Judge Parente came on to be heard before Chief Judge Mishler. At the hearing Bohack presented to the District Court an order to show cause for a preliminary injunction containing a temporary restraining order against the threatened resumption of the strike and picketing (130a-131a). In addition Chief Judge Mishler called up before him

for determination Local 807's pending removed petition to confirm the arbitration award of May 16, 1975.

After hearing argument of counsel on all issues and receiving briefs and reply briefs, Chief Judge Mishler on November 19, 1975 rendered a Memorandum of Decision and Order in which he (a) reversed Judge Parente's preliminary injunction on jurisdictional grounds; (b) dismissed the petition of Local 807 to confirm the award of the New York City Joint Local Committee against Bohack and (c) remanded to Bankruptcy Judge C. Albert Parente "the issue of the advisability of granting the debtor leave to arbitrate" its continuing dispute with Local 807 regarding alleged subcontracting (129a). Judge Mishler also signed Bohack's order to show cause temporarily restraining Local 807 from striking or picketing and made Bohack's motion for a preliminary injunction returnable on November 26, 1975.

On November 25, 1975 Local 807 obtained an order to show cause why Judge Mishler's temporary restraining order should not be dissolved which was also returnable on November 26, 1975. After hearing the presentations of both sides on the matter, and in view of Bohack's petition to reject the contract with Local 807 then pending undetermined before Bankruptcy Judge Parente, Chief Judge Mishler denied Local 807's motion to dissolve the temporary restraining

order and extended the restraining provisions of that order until Judge Parente ruled on two preliminary issues: (i) whether to allow arbitration of the alleged subcontracting dispute pursuant to Bankruptcy Rule 919(b) and (ii) whether to permit Bohack to reject its executory contract with Local 807 pursuant to the Bankruptcy Act (187a-188a).

The statement of facts in Local 807's brief is quite lengthy and states numerous alleged facts that have no support whatsoever either in the record or in the so-called "joint appendix," which, despite appellee's objection, itself contains many documents that are not in the record. In addition, appellant's brief contains whole pages of alleged facts without a single reference to the so-called joint appendix. Appellee's failure to contest the propriety of this Court considering any of the irrelevant unsupported "facts" asserted by appellant in its brief is not to be construed as an acceptance of their accuracy.

ARGUMENT

POINT I

THE MAY 16, 1975 GRIEVANCE AWARD OF THE NEW YORK CITY JOINT LOCAL COMMITTEE IS TOTALLY VOID FOR TWO INDEPENDENT AND EQUALLY COMPELLING REASONS AND ACCORDINGLY THE DECISION BELOW THAT REFUSED TO CONFIRM IT WAS CORRECT AND SHOULD BE AFFIRMED

A. THE NEW YORK CITY JOINT LOCAL COMMITTEE'S MAY 16, 1975 AWARD IS VOID BY VIRTUE OF THE ABSENCE OF ANY PRIOR AUTHORIZATION BY THE BANKRUPTCY COURT TO SUBMIT THE UNION'S SUBCONTRACTING CLAIM AGAINST BOHACK TO ARBITRATION AS REQUIRED BY BANKRUPTCY RULE 919(b).

Rule 919(b), which became effective October 1, 1973, and which superseded Section 26(a) of the Bankruptcy Act, 11 U.S.C. §49(a), provides:

> "On stipulation of the parties to any controversy affecting the estate the court may authorize the matter to be submitted to final and binding arbitration."

Section 26(a) similarly provided:

> "The receiver or trustee may, pursuant to the direction of the court, submit to arbitration any controversy arising in the settlement of the estate".

Appellant does not question that decisions interpreting the meaning and application of Section 26(a) apply to Rule 919(b).

The courts have uniformly interpreted Section 26(a) as requiring a trustee in bankruptcy or a debtor in possession to obtain prior approval of the bankruptcy court before submitting any claim against the estate to arbitration. As the court pointed out in Lincoln National Life Ins. Co. v. Scales, 62 F.2d 582, 585 (5th Cir. 1933), "[A trustee's] powers depend upon the law. He may not compromise or arbitrate anything except under the court's approval." For this reason, where an arbitration involving a bankrupt's estate was not undertaken "pursuant to the direction of the court", the arbitrator's award was set aside. In re McLam, 97 Fed. 922, 923 (D. Vt. 1899).

Appellant appears to argue that in requiring the bankruptcy court's permission as a prerequisite to the arbitration of the Union's claims against Bohack the court below somehow subverted the strong federal labor policy in favor of arbitration expressed in the "Steelworkers Trilogy" cases of the United States Supreme Court*. While it is true

* Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); Steelworkers v. American Manufacturing Co., 363 U.S. 564 (1960).

that these cases establish the principle that courts are to refrain from deciding the merits of an arbitrable labor dispute and to leave such issues to the arbitrator, such a ruling could not have been intended to apply to arbitrable labor claims against a bankrupt's estate the resolution of which might affect the rights of third party creditors who were not parties to the arbitration agreement.

The Steelworkers' cases established a federal labor policy; neither those cases nor the decisions of this court cited by appellant that apply that policy* have attempted to determine the effect of such labor policy on the federal policies applicable to bankrupt estates.

In his November 19, 1975 Memorandum of Decision and Order Chief Judge Mishler correctly analogized the teaching of Shopmen's Local Union No. 455, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO v. Kevin Steel Products, Inc., 519 F.2d 698 (2d Cir. 1975) and Brotherhood of Railway, Airline and Steamship Clerks et al. v. REA Express et al., 523 F.2d 164 (2d Cir. 1975). In referring to the former decision, Chief Judge Mishler noted,

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* United Optical Workers Union Local 408 v. Sterling Optical Company, Inc., 500 F.2d 220 (2d Cir. 1974) and Bresette v. International Talc Co., F.2d , 91 LRRM 2077 (2d Cir. 1975).

> The court found no irreconcilable conflict between the policy of the Bankruptcy Act in preserving the funds of the debtor and to give the debtor a new start on the one hand, and that of the National Labor Relations Act encouraging the creation and enforcement of collective bargaining agreements (519 F.2d at p. 706). This court finds no irreconcilable conflict between the Bankruptcy Act and the strong federal policy favoring the arbitration of labor disputes. (126a)

As in Kevin Steel and REA Express, supra, the mere fact that the contract is a collective bargaining agreement does not oust the bankruptcy court of the jurisdiction or discretion the Bankruptcy Act gives it. Since the Steelworker's Trilogy of 1960, the two Courts of Appeals that faced this issue have permitted the Bankruptcy courts in their circuits to continue to exercise their judicial discretion including that now mandated by Bankruptcy Rule 919(b).

In re Muskegon Motor Specialties Company, 313 F.2d 841 (6th Cir. 1963), the union, seeking to arbitrate a claimed breach of a collective bargaining agreement with the bankrupt, argued, as does the union here, that federal policy favors arbitration of labor disputes, citing the Trilogy, supra. The Court affirmed the bankruptcy court's refusal to permit arbitration and declared,

> The reorganization court had "exclusive jurisdiction of the debtor and its property wherever located". 11 U.S.C. §511 . . . [T]he court had all the powers of a bankruptcy court . . .and of a court of equity. 11 U.S.C. §§514, 516 . . . The bankruptcy court does not ordinarily surrender

> its jurisdiction except under exceptional circumstances. Mangus v. Miller, 317 U.S. 178, 186, 63 S. Ct. 182, 87 L.Ed. 169. Whether the bankruptcy court should surrender its jurisdiction to another tribunal involved the exercise of judicial discretion. Thompson v. Magnolia Petroleum Co., 309 U.S. 478, 483, 60 S. Ct. 628, 84 L. Ed. 876. 313 F.2d at 842.

Accord, Johnson v. England, 356 F.2d 44 (9th Cir. 1966), also referred to by Chief Judge Mishler.

Finally, the Union argues that Rule 919(b) does not apply to this case since the contractual arbitration clause was effective prior to the reorganization proceeding. It relies on Tobin v. Plein, 301 F.2d 378 (2d Cir. 1962) and Schilling v. Canadian Foreign Steamship Co., 190 F. Supp. 462 (S.D.N.Y. 1961).

Clearly Muskegon Motor Specialties and Johnson v. England, supra, do not draw the distinction sought by the Union between arrangements for arbitration entered into before, as compared to after, the effective date of the reorganization proceeding. Nor do the cases relied upon by the Union support its position.

The Union simply misreads Tobin, supra. That case holds that if a contract provides its own mechanical procedural requirements they will govern rather than those contained in the now repealed former subsections (b) and (c) of former Section 26. But just as clearly Tobin, supra, does not relieve litigants from the judicial approval requirement in Rule 919(b) merely because there is a preexisting arbitration agreement. Indeed in Tobin itself the Court expressly noted

that an application to the Bankruptcy Court for approval of the submission of a dispute to arbitration had been made and granted by the Court notwithstanding the preexisting arbitration contract.

In Schilling, supra, Judge Dimock expressly recognized that where, as here, the bankrupt estate is a defendant, it may not be forced to defend in arbitration without prior judicial approval. Judge Dimock did allow arbitration, without prior judicial approval in the particular facts in Schilling since the bankrupt estate there was the plaintiff. The judge took care to expressly distinguish that case (estate as plaintiff) from this one (estate as defendant), for reasons central to the purpose of the bankruptcy law:

> "The trustee by forcing [the defendant] to trial in this court would be depriving [it] of the right to arbitration for which it had bargained. That would be all very well if [defendant] were asserting a claim against the estate. The very purpose of bankruptcy proceedings is to diminish the rights of the creditors. Bankruptcy does not, however, deprive the bankrupt's debtors of their rights." 190 F. Supp. at 463.

Thus it is clear that the arbitration award of May 16, 1975 is a nullity since it was rendered without the judicial approval required by the Bankruptcy Act.

B. THE NEW YORK CITY JOINT LOCAL COMMITTEE HAD NO SUBJECT MATTER JURISDICTION OF THE DISPUTE

Even if Bankruptcy Rule 919(b) had been complied with the New York City Joint Local Committee's award was also a nullity because that committee had no subject matter jurisdiction to pass upon the particular issue the Union submitted to it since the dispute involved the interpretation of Article 32 of the National Master Freight Agreement.

There can be no serious question that the issue between the parties that the Joint Local Committee purported to resolve in this case involved the question of the interpretation of the subcontracting provisions contained in Article 32 of the National Master Agreement. The very award of the Joint Local Committee on which the Union here relies states:

> "Based on the evidence and testimony presented in this instant case, the Committee is constrained and has no alternative but to rule the Company is in violation of Article 32. Accordingly the Company is ordered to cease and desist forthwith, from having its bargaining unit work subcontracted out which is violative of said article." (46a).

The contract expressly grants exclusive jurisdiction over such an issue to a completely different arbitral forum - the National Grievance Committee. This is clear from a mere reading of Article 8 of the Master Agreement and is confirmed by the language of Article 45 of the Supplemental Agreement which creates the Joint Local Committee involved in this case.

Section 1(b) of Article 8 of the Master Agreement expressly provides that "any question concerning the interpretation of the provisions contained in the Master Agreement, shall be submitted to a permanent National Grievance Committee" whose majority decision is to be final and binding on the parties. (12a). To emphasize the exclusivity of this jurisdiction of the National Grievance Committee, Section 1(a) of the same Article provides that "questions of interpretation arising under the provisions of the Supplemental Agreement" and "factual grievances" under either the National Master Agreement or the Supplemental Agreement are to be" processed in accordance with the grievance procedure of the applicable Supplemental Agreement" (involving a hearing before a Joint Local Committee) but that any "request for interpretation of the National Master Agreement shall be submitted directly to the Conference Joint Area Committee for the making of a record on the matter, after which it shall be immediately referred to the National Grievance Committee". (12a)

Consistent with this division of jurisdiction that the National Master Agreement provides, Section 8 of Article 45 of the Supplemental Agreement (which creates both the Joint Local Committee and the Conference Area Committee) expressly states:

> Grievances and questions of interpretation which are subject to handling under the provisions of Article 8 of the National Agreement shall be referred to the National Grievance Committee. (32a)

The Union's brief confuses the issue by taking this Court on a lengthy excursion through the alleged history of negotiations of the various agreements (facts not in the record) and through various irrelevant clauses and sections of the various agreements. All of this leads to the following statement, entirely unsupported by any citation to any provision of any agreement:

> Although the National Grievance Committee has sole jurisdiction to make final interpretations of the National Section an interpretation of the National Section can be made by the [Joint Local] Committee, Joint Area Committee or Eastern Conference Joint Area Committee. (Appellant's Brief, at 50).

This statement is clearly contrary to the intended exclusive jurisdiction of the National Grievance Committee, as discussed, supra.

For the above reasons, the Joint Local Committee had no contractual jurisdiction to hear the particular dispute submitted to it since the very contract which the Union claims was violated provides exclusive jurisdiction of such disputes to other arbitration committees.

Notwithstanding the complete lack of jurisdiction of the Joint Local Committee to hear or decide the matter, a proceeding was had before that Committee on May 12, 1975 with respect to the interpretation of the subcontracting provisions contained in Article 32 of the National Master Agreement.

The lack of subject matter jurisdiction was specifically objected to by the Debtor at the arbitration hearing (87a, 96a). But even if the Debtor had not so objected, it is axiomatic that a judgment rendered by a tribunal without jurisdiction of the subject matter is totally void. Restatement of Judgments §7 (1942); Spatt v. State of New York, 361 F. Supp. 1048, 1052 (E.D. N.Y. 1973), aff'd, 414 U.S. 1058 (1973). A bankruptcy court cannot issue a divorce nor a small claims court adjudge a bankruptcy. From the face of the contract in question, exclusive jurisdiction of the dispute in question was vested in an arbitration panel other than the one which rendered the void award relied upon by the Union. As correctly stated by Chief Judge Mishler (127a):

> It is apparent that the grievance as presented to the Joint Local Committee was a matter outside its jurisdiction and the proceedings upon which it was based a nullity.

The Union seeks to convert Bohack's objection to the jurisdiction of the Local Committee over disputes involving a claimed violation of Article 32 to a procedural objection which under accepted principles of arbitration is to be determined by the arbitrator and not by a court. In this connection it cites Cox, Reflections Upon Labor Arbitration, 72 Harv. L. Rev 1482, 1511 (1959). Cox, however, specifically excepted questions of subject matter jurisdiction, the very question raised by Bohack in this proceeding, from the general principle that an arbitration forum can determine matters of procedure:

> Using the technical language of the law, I suggest that the conventional arbitration clause limiting the arbitrator to disputes concerning "interpretation and application" of the contract reserves the right to a judicial determination upon whether the arbitrator has jurisdiction over the subject matter but that all other questions - procedural, jurisdictional or substantive - are solely within the power of the arbitrator to determine.

Both the failure to obtain prior judicial approval and, independently, the lack of subject matter jurisdiction of the forum, render the May 16, 1975 award of the New York City Joint Local Committee totally void. Chief Judge Mishler's order dismissing Local 807's petition to confirm that award was correct and should be affirmed.

POINT II

THE ALLEGED DEFICIENCIES IN THE INJUNCTIVE ORDER OF NOVEMBER 26 PROVIDE NO BASIS FOR A WRIT OF MANDAMUS AND ARE WITHOUT FOUNDATION IN LAW OR FACT

The Supreme Court in The Boys Markets, Inc. v. Retail Clerk's Union, Local 770, 398 U.S. 235 (1970), harmonized the Norris-LaGuardia Act with Section 301 of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. §185(a). Thus, in appropriate circumstances, the Supreme Court permitted and indeed directed the federal district courts to enjoin strikes violating collective bargaining agreements.

The Union has asserted that three of the preconditions for issuance of Boys Markets relief have not been met by the court below in this case. Specifically it asserts that the temporary restraining order was erroneously continued for too long a period of time; that the underlying dispute was erroneously found to be arbitrable; and that Bohack was erroneously not ordered to arbitrate.

Writs of mandamus traditionally have been issued by the federal appellate courts only in unusual circumstances. It is true, as appellant points out, that the use of the writ on two occasions was broadened (1) to effect "supervisory control" over the district courts in La Buy v. Howes Leather,

352 U.S. 249 (1957) and (2) as a mechanism for rendering "advisory" decisions on new and important questions of law in Schlagenhauf v. Holder, 379 U.S. 104 (1964). However, the United States Supreme Court thereafter made it clear that use of these writs is still to be confined to cases involving the required exceptional circumstances. Will v. United States, 389 U.S. 90 (1967). As stated by Chief Justice Warren,

> Courts faced with petitions for the peremptory writs must be careful lest they suffer themselves to be misled by labels such as 'abuse of discretion' and 'want of power' into interlocutory review of nonappealable orders on the mere ground that they may be erroneous (id, at 98 footnote 6).

Moreover, the party seeking mandamus has the "burden of showing that its right to issuance of the writ is 'clear and indisputable'" [id. at 96, quoting from Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 384 (1953)].

In American Flyers Airline Corporation v. Farrell, 385 F.2d 936 (2d Cir., 1967), this court denied a petition for a writ of mandamus to review an order of the United States District Court for the Southern District of New York denying motions under 28 U.S.C. §1404(a) to transfer the place of trial of five civil actions to the United States District Court for the Eastern District of Oklahoma. This court held itself to be without power to issue the writ since

> [T]he All Writs statute cannot 'be availed of to correct a mere error in the exercise of conceded judicial power' but can be used only 'when a court has no judicial power to do what it purports to do -- when its action is not mere error but usurpation of power.' [id. at 937, quoting from De Beers Consol. Mines, LTD v. United States, 325 U.S. 212, 217 (1945).]

This court went on to state the test that "the writ may issue only 'in really extraordinary causes'." [id., at 937]. And, relying on the Will case, supra, this court referred to the situation before it and declared:

> where it is evident as here that the Judge has exercised his discretion in a judicial manner, and that the case before us is not a 'really extraordinary cause' we should summarily deny the petition for mandamus. (id., at 938).

Mandamus should not lie in this case since none of the "touchstones" of review -- no exceptional circumstances -- are present. Certainly every time a District Judge makes a decision on an issue which has a different wrinkle or arises in a somewhat different way, his determination will not be the proper subject of judicial review through the extraordinary writ of mandamus. This would hardly further any "supervisory" or "advisory" role of the appellate courts. Rather, it would destroy the viability

of the District Court system as a decision making entity by eliminating the salutary "final judgment" rule. This further emphasizes the necessity of limiting mandamus to "extraordinary" cases.

Specifically, none of Local 807's objections to Chief Judge Mishler's November 26 Order constitutes an exceptional circumstance or usurpation of power sufficient to permit mandamus, and Chief Judge Mishler's Order was correct in all respects.

First, Local 807's contention that the temporary restraining order was erroneously continued for too long a period of time does not involve an extraordinary circumstance permitting mandamus. Rather, courts dealing with this situation have found that such orders constitute appealable preliminary injunctions.

On November 19, 1975, when Chief Judge Mishler dissolved the preliminary injunction issued by Judge Parente, he signed an order temporarily restraining Local 807 from striking or picketing pending a hearing on Bohack's motion

for a new preliminary injunction which he directed to be held before him on November 26, 1975. On that date both parties appeared and presented arguments before Chief Judge Mishler on the issue of injunctive relief. As a result of that proceeding Chief Judge Mishler made the following findings and conclusion:

> With the motion [for a preliminary injunction] before me I will tell you what I am going to do... I find that there is just cause to extend the restraining provisions of the temporary restraining order, in that the issue before me may be rendered moot by either or the rejection of the contract and the determination on the advisability of arbitrating the issues in accordance with the arbitration procedure, grievance in arbitration procedure of the contract, or under now Bankruptcy Law 919(b) and the terms of the temporary restraining order are extended to a determination by Judge Parente on those issues, and if either side appeals to this Court from that decision, at such time as the appeal is determined (187a-188a).

In so doing he found just cause "to extend the restraining provisions of the temporary restraining order" (188a) pending an imminent determination by the Bankruptcy Judge whether to permit rejection of the executory contract and whether to permit the dispute to be submitted to final and binding arbitration.

Clearly, Chief Judge Mishler's determination after a full hearing on the injunction motion "to extend the restraining provisions of the temporary restraining order"

constituted the granting of a preliminary injunction. As this Court held in Pan American World Airways, Inc. v. Flight Engineers' International Association, 306 F.2d 840 (2d Cir. 1962),

> We hold, therefore, that the continuation of the temporary restraining order beyond the period of statutory authorization, having, as it does, the same practical effect as the issuance of a preliminary injunction, is appealable within the meaning and intent of 28 U.S.C. §1292(a)(1) (at 8431).

The court added,

> ...we consider that the temporary restraining order became an appealable preliminary injunction (at 843, footnote 4).

The Supreme Court recently reaffirmed this proposition stating,

> [W]here an adversary hearing has been held, and the court's basis for issuing the order strongly challenged, classification of the potentially unlimited order as a temporary restraining order seems particularly unjustified. Therefore we view the order at issue here as a preliminary injunction. (Sampson v. Murray, 415 U.S. 61, 87-88 (1974).

Granny Goose Foods, Inc. v. Teamsters, 415 U.S. 423 (1974) is not to the contrary. In that case the Court held that the District Court's denial of the Union's motion to dissolve the restraining order did not of itself effectively convert the order into a preliminary injunction of unlimited duration. The court stated,

> Where a court intends to supplant [a temporary restraining order] with a preliminary injunction of unlimited duration pending a final decision on the merits or further order of the court it should issue an order clearly saying so and where it has not done so, a party against whom a temporary restraining order has issued may reasonably assume that the order has expired within the time limits imposed by Rule 65(b). Here, since the only orders entered were a temporary restraining order of limited duration and an order denying a motion to dissolve the temporary order, the Union had no reason to believe that a preliminary injunction of unlimited duration had been issued. [emphasis added] (at 445).

Unlike the situation in Granny Goose Foods, where the Union reasonably believed that the order had expired, in the case at bar the Union clearly knew that injunctive relief of indefinite duration had been issued within specific limits as set by the Court.

Moreover, unlike the situation in Granny Goose Foods, on November 26, 1975 Chief Judge Mishler had before him not only the Union's motion to dissolve the temporary restraining order, but also and more significantly Bohack's motion for a preliminary injunction. Indeed, Chief Judge

Mishler specifically asked counsel for the Union, "Are you ready to proceed on the motion for a preliminary injunction?" to which Counsel responded, "Yes, your Honor". (170a) Moreover, counsel for the Union subsequently declared, "Your honor, this proceeding is on a temporary restraining and preliminary injunction..." (173a). The argument before Chief Judge Mishler clearly centered on the granting of injunctive relief.

Further, Chief Judge Mishler also pointed out at the hearing that it would be within the Union's power to "accelerate the length of time of the temporary restraining order by completing the hearing before Judge Parente" (188a) and this followed from his determination that "the union has by design delayed the proceeding before Judge Parente" (187a).

When read together, the Supreme Court's decisions in Sampson, supra, and Granny Goose Foods clearly support the conclusion that Chief Judge Mishler's order constituted a preliminary injunction. Consequently its issuance was not improper because it was of an indefinite duration pending certain determinations by Bankruptcy Judge Parente.

Appellant impliedly admits that the order of November 26, 1975, was in fact a preliminary injunction by contending that the order erroneously failed to comply with

the holding of the Boys Markets case in two alternative respects: (1) the underlying dispute was not arbitrable as it is required to be and (2) Bohack was not ordered to arbitrate the underlying dispute as a condition for obtaining the injunction against a strike and picketing. Neither of these claimed requirements of the Boys Markets case is applicable to a temporary restraining order; each is applicable, if at all, to the issuance of a preliminary or permanent strike injunction. Consequently, Chief Judge Mishler's November 26, 1975 order was a preliminary injunction appealable as of right under 28 U.S.C. 1292(a)(1). Mandamus is not the appropriate avenue for review of that determination. Over a half century ago the Supreme Court of the United States held that the extraordinary writ of mandamus would not lie where review by appeal was available, concluding:

> It is well settled that where a party has the right to a writ of error or appeal, resort may not be had to the extraordinary writ of mandamus or prohibition. (citations omitted). As the petitioner had the right of appeal to the Circuit Court of Appeals he could not resort to the writ of mandamus or prohibition. Ex Parte Tiffany, 252 U.S. 32, 37 (1920).

Dismissal of the Writ is required even if this Court were inclined to treat the petition for a writ of mandamus in this case as a notice of appeal from a

preliminary injunction. The reason for this conclusion is a simple one. When Local 807 filed its petition for mandamus with this Court on January 9, 1976 the 30-day period for appeal from Chief Judge Mishler's injunctive order of November 26, 1975 had long since expired. Consequently Local 807 could no longer seek review of that order. The Union cannot avoid the jurisdictional requisite of a timely notice of appeal by merely filing an untimely improper petition for a writ of mandamus instead. Since appellant's time to appeal from the injunction expired long before it filed its petition for a writ of mandamus, the arguments concerning these claimed deficiencies in the order of November 26, 1975 are not now properly before this Court.

In any event both claimed deficiencies in the order of November 26, 1975 are without foundation in law or fact. The claim that the injunction should not have issued because the underlying dispute was not arbitrable in the sense that it had already been arbitrated is merely another way of claiming that the District Court erroneously refused to confirm the award of the Joint Local Committee. We have fully dealt with this contention in Point I of this brief. The

second claim of error, based on the contention that Boys Markets injunctions must be accompanied by an express order to arbitrate, was completely disposed of in Inland Steel Co. v. Local Union No. 1545 United Mine Workers of America, 505 F.2d 293, (7th Cir. 1974) where the court held (at p. 300):

> Finally, the unions complain that the injunctions were improperly entered because they were not conditioned on the companies' willingness to arbitrate these disputes. The collective bargaining agreement here contains a mandatory arbitration clause. Where a dispute exists which is not otherwise resolved under the "Settlement of Local and District Disputes" section of the agreement, the parties are contractually obliged to submit the matter to arbitration. At no time have the employers in the instant cases shown a reluctance or unwillingness to arbitrate the issues in dispute. On the contrary, by seeking Boys Markets injunctions, they demonstrated their desire to settle the dispute through arbitration. And, since the injunction may issue only if the dispute is subject to the agreement's mandatory arbitration provisions, the injunctive orders implicitly require the parties to arbitrate. Accordingly, the injunctions were not improperly entered and need not be modified.

Accord, Windsor Power House Coal Co. v. District 6, United Mine Workers F.2d , 78 CCH Lab. Cases. ¶11235 (4th Cir. Feb. 3, 1976).

This case presents a dispute which is unquestionably arbitrable. Bohack, as a debtor in possession is ready

and willing to go to arbitration if the bankruptcy court grants the permission required by Rule 919(b). The problem lies not with the employer, (as in Chief Freight Lines Co., v. Local 886 International Brotherhood of Teamsters, 514 F.2d 572 (10th Cir. 1975), where the employer sought to stay arbitration) and not with the contract (as in Emery Air Freight v. Local 295, International Brotherhood of Teamsters, 449 F.2d 558 (2d Cir. 1971), where the arbitrability of the dispute was questionable), but with Bankruptcy Rule 919(b) which requires approval of the Bankruptcy Judge before arbitration can proceed in this case.

Even if one should assume that federal labor policy requires that all Boys Markets injunctions be accompanied by an order directing arbitration, such a policy must be harmonized with the equally compelling federal bankruptcy policy requiring that the arbitration of claims against a bankrupt be subject to the prior approval of the bankruptcy court. We submit that the procedure and ruling adopted by Chief Judge Mishler in this case achieves such harmony by giving effect to both policies to the extent that they are not mutually repugnant.

POINT III

WHETHER THE BANKRUPTCY COURT SHOULD GRANT BOHACK'S PETITION TO REJECT THE BARGAINING AGREEMENT WITH LOCAL 807 IS NOT AN ISSUE PROPERLY BEFORE THIS COURT IN THIS CONSOLIDATED PROCEEDING

There is now pending before Bankruptcy Judge Parente a petition by Bohack, as a debtor in possession, to have the bankruptcy court reject the collective bargaining agreement between Bohack and Local 807 under the authority recognized by this court in Shopmen's Local Union No. 455, International Association of Bridge Structural and Ornamental Iron Workers, AFL-CIO v. Kevin Steel Products, Inc., 519 F.2d 698 (2d Cir. 1975). Hearings before Judge Parente are now in process and no determination has yet been reached on the matter. Nevertheless, appellant in Point III of its brief asks this court now to determine "whether the conduct of Bohack, as a debtor in possession, constitutes an assumption of the agreement" (Appellant's Brief, at 37). This is so clearly improper as to require no further discussion.

CONCLUSION

For all the foregoing reasons, the appeal and pe-

tition for a writ of mandamus should be dismissed and the orders below should be affirmed.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

TRUCK DRIVERS LOCAL UNION NO. 807, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, Plaintiff-Appellant, v. THE BOHACK CORPORATION, Defendant-Appellant, TRUCK DRIVERS LOCAL UNION NO. 807, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, Petitioner, v. HONORABLE JACOB MISHLER, CHIEF JUDGE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK, Respondent.	AFFIDAVIT OF SERVICE BY MAIL Index No. 75-7694 76-3003

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

Donna Giglio , being duly sworn, deposes and says that she is over the age of 18 years, that he resides at 64-33 Cooper Ave., Glendale, N.Y. , and that he is not a party to the above-entitled proceeding

That on the 15th day of March , 1976, he served the annexed Brief of defendant-appellee, The Bohack Corporation on the attorney(s) hereinafter named by depositing (a) two true copy(~~ies~~) thereof contained in (a) securely sealed, post-paid

wrapper(s), properly addressed to the said attorney(s) as follows:

J. Warren Mangan, Esq.
32-43 49th Street
Long Island City, New York 11103

in the letter box regularly maintained and exclusively controlled by the United States Postal Service at 350 Park Avenue, Borough of Manhattan, New York, New York 10022.

Donna Siglin

Sworn to before me this
15th day of March, 1976.

Joseph Warren

JOSEPH WARREN
Notary Public, State of New York
No. 03-9539130
Qualified in Bronx County
Certificate filed in New York County
Commission Expires March 30, 1976